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MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties,

Petitioners

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,
Special Agent, Internal Revenue Service,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 26, 1974
CERTIORARI GRANTED JANUARY 27, 1975

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975 No. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties,
Petitioners

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,
Special Agent, Internal Revenue Service,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOCKET ENTRIES

United States District Court for the Eastern District of Pennsylvania

February 2, 1972	Petition to enforce internal revenue summons and affidavit of Alan M. Feldman, filed.
February 8, 1972	Ordered 2/8/72 that Solomon Fisher appear in the U.S.D.C. on 3/3/72 at 10:30 A.M. to show cause why he

	should not be compelled to obey the Internal Revenue summons issued to him on 12/1/71, etc., filed. 2/9/72 entered and copy to U.S. Attorney.
February 11, 1972	Affidavit of Alan M. Feldman re service of Order dated 2/8/72 upon Solomon Fisher respondent, on 2/11/72, filed.
February 28, 1972	Respondent, Solomon Fisher's answer to petition to enforce internal revenue summons, filed.
March 2, 1972	Petition of Morris Goldsmith and Sally Goldsmith to intervene, filed.
March 2, 1972	Memorandum in support of petition to intervene of Morris Goldsmith and Sally Goldsmith, filed.
March 2, 1972	Government's memorandum in opposition to petition of Morris Goldsmith and Sally Goldsmith to intervene, filed.
March 3, 1972	Government's motion to quash subpoena duces tecum and memorandum in support of motion, filed.
March 3, 1972	HEARING re motion to produce documents: The Court grants motion of Morris and Sally Goldsmith to intervene as party defendants. Witnesses sworn. Motion to produce documents —C.A.V.
March 14, 1972	Order dated 3/8/72 that the amended petition to intervene is granted and Morris Goldsmith and Sally Goldsmith are parties to this proceeding, filed. 3/14/72 entered and copies mailed.

May 22, 1972	Transcript of 3/3/72 filed.
June 1, 1972	Government's brief, filed.
June 2, 1972	Defendants' proposed findings of fact, filed.
June 2, 1972	Defendants' memorandum, filed.
June 29, 1972	Government's Reply Brief filed.
June 30, 1972	Reply Brief of Respondents, filed.
August 7, 1972	Memorandum, DAVIS, J., and Order dated 8/4/72 that respondent appear before petitioner (within 30 days) at Room 752, 401 N. Broad St. and produce for inspection those items enumerated in the summons dated 12/1/71, filed. (8/8/72 entered and copies mailed)

. . . .

CHRONOLOGY

United States Court of Appeals for the Third Circuit

May 25, 1973	Argument before ALDISERT and HUNTER, Circuit Judges, and STAPLETON, District Judge.
April 10, 1974	Reargument before SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, Circuit Judges.
June 7, 1974	Opinion filed.

CHRONOLOGY

Supreme Court of the United States

July 26, 1974	Petition For Writ Of Certiorari, filed.
January 27, 1975	Petition For Writ Of Certiorari granted. Case consolidated with *United States v. Kasmir*, No. 74-611.

Summons

Department of the Treasury
Internal Revenue Service

Intelligence Division
Post Office Box 12914
Phila., Pa. 19108
Phone: 597-2255

In the matter of the tax liability of
MORRIS GOLDSMITH
Internal Revenue District of Philadelphia
Period(s) 1969 and 1970

The Commissioner of Internal Revenue

To SOLOMON FISHER, ESQUIRE
AT 123 South Broad Street
Philadelphia, Pennsylvania

Greetings: You are hereby summoned and required to appear before ALAN M. FELDMAN, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

1. Analysis of Receipts and Disbursements for MORRIS GOLDSMITH for 1969 and 1970.
2. Copies of Payroll Tax Returns for MORRIS GOLDSMITH for 1969 and 1970.
3. Analysis of Receipts and Disbursements for SALLY GOLDSMITH for 1969 and 1970.

The above-mentioned records were prepared by and are the property of HAROLD BERSON, C.P.A.

Place and time for appearance: at Room 752, Intelligence Division, 401 North Broad Street, Philadelphia, Pa. 19108 on the 13th day of December, 1971 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 1st day of December, 1971.

ATTESTED COPY: Alan M. Feldman, Special Agent

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners

Misc. 72-18

v.

SOLOMON FISHER,
Respondent

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

Now come the United States of America and Special Agent Alan M. Feldman, Internal Revenue Service, by their attorney, Louis C. Bechtle, United States Attorney for the Eastern District of Pennsylvania, and respectfully show unto this Court as follows:

I

This is a proceeding brought under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§7402(b) and 7604(a) (1964) to judicially enforce an Internal Revenue summons.

II

The petitioner, Alan M. Feldman, is a Special Agent of the Internal Revenue Service, employed in Philadelphia, Pennsylvania, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602 (1964), and Treasury Regulations on Procedure and Administration §301. 7602-1, 26 C.F.R. §301. 7602-1 (TD 6421, October 23, 1959 and TD 6498, October 24, 1960).

III

The respondent, Solomon Fisher, is an attorney who maintains offices at 123 South Broad Street, Philadelphia, Pennsylvania.

IV

Petitioner, Special Agent Alan M. Feldman, Internal Revenue Service, has been participating in an investigation to determine the federal tax liabilities of Morris Goldsmith for the years 1969 and 1970.

V

The respondent, Solomon Fisher, is in possession and control of records, documents, papers and information relating to the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

VI

On December 1, 1971, a summons, Treasury Form 2039, was issued by the petitioner, Alan M. Feldman, directing the respondent to appear before the petitioner, Special Agent Feldman, on December 13, 1971, to testify and to produce certain records, documents, papers and information all as more fuliy set forth in the attached affidavit and summons. An attested copy of the summons was handed to the respondent on December 1, 1971. The summons issued to the respondent is attached hereto and incorporated herein as Exhibit A.

VII

The respondent, Solomon Fisher, has failed and refused to comply with said summons to testify and to produce documents as required by said summons.

VIII

In was and now is essential to the determination of the tax liabilities of the taxpayer, Morris Goldsmith, for the years 1969 and 1970, that the respondent, Solomon Fisher,

be required to testify and to produce the records, documents, papers and information demanded, as is evidenced by the affidavit of Special Agent Alan M. Feldman, attached hereto and incorporated herein.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, Solomon Fisher, to show cause, if any he has, why he should not comply with and obey the summons described in Paragraph VI above, in each and every requirement thereof.

2. That this Court enter an order directing the respondent, Solomon Fisher, to obey the aforementioned summons in each and every requirement thereof, and ordering his attendance and testimony and production of records, documents, papers and information as required and called for by the terms of the summons, before Special Agent Alan M. Feldman, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Feldman or any other proper officer of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That this Court render such other and further relief as is just and proper.

LOUIS C. BECHTLE
United States Attorney

By: /s/ JAMES C. SOMMAR
Assistant United States Attorney

(Exhibit A to this Petition is a copy of the Summons printed on pages 4a-5a, supra.)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT

ALAN M. FELDMAN, a petitioner herein, being first duly sworn deposes and says:

1. That he is a duly commissioned special agent of the Internal Revenue Service with post of duty at Philadelphia, Pennsylvania.

2. That in his capacity as a special agent, he was assigned to participate in the investigation of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

3. That pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, 26 U.S.C. §§7602 and 7603 (1964), a summons, Treasury Form 2039, was served upon Solomon Fisher, on December 1, 1971, by your affiant handing an attested copy of the summons to the respondent. The summons which is Exhibit A to this petition and made a part hereof, directed Solomon Fisher to appear before your affiant on December 13, 1971, in the offices of the Internal Revenue Service, 401 North Broad Street, Philadelphia, Pennsylvania, then and there to give testimony and to produce records, documents, papers and information in aid of the investigation of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

4. That Solomon Fisher appeared at the designated time and place in response to the summons but refused to testify or to produce the materials demanded and such failure has continued to the date of this affidavit.

5. That the testimony, records, documents, papers and information demanded by the summons served upon Solomon Fisher are necessary for the determination of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

Further your affiant saith not except that this affidavit is in support of a petition to enforce an Internal

Revenue summons issued by the Commissioner of Internal Revenue to Morris Goldsmith.

ALAN M. FELDMAN
Special Agent

Sworn to and subscribed before me this day of , 1972.

Notary Public

My commission expires

(Exhibit A to this Affidavit is a copy of the Summons printed on pages 4a-5a, supra.)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

ORDER TO SHOW CAUSE

Upon petition, the exhibit attached thereto, the affidavit of Special Agent Alan M. Feldman, Internal Revenue Service, and upon motion of Louis C. Bechtle, United States Attorney, it is

ORDERED that Solomon Fisher appear before the United States District Court for the Eastern District of Pennsylvania in that branch thereof presided over by the undersigned on the 3rd day of March, 1972, at 10.30 A.M. to show cause why he should not be compelled to obey the Internal Revenue summons issued to him on December 1, 1971. It is further

ORDERED that a copy of this Order, the petition, exhibit and affidavit be served upon the respondent, Solomon Fisher, at least 20 days prior to the time set for hearing. It is further

ORDERED that Special Agent Alan M. Feldman is especially appointed to serve this Order, the petition, exhibit and affidavit upon the respondent.

Dated at Philadelphia, Pennsylvania, this 8th day of February, 1972.

/s/ J. M. DAVIS
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

ANSWER TO PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

FIRST DEFENSE

1. The allegations set forth in Paragraphs III and V of the Petition To Enforce Internal Revenue Summons ("Petition") are admitted. The allegations of Paragraph VII of the Petition are denied (see following paragraph). With respect to Paragraph VI, respondent admits only that Exhibit A is a copy of the document served on him on December 1, 1971. Respondent is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph VI and as to all the allegations of Paragraphs I, II, IV and VIII.

2. Respondent avers that to the extent that the records, documents, papers and information requested were in his possession, he brought them with him as requested in the purported summons but refused to deliver them to Special Agent Feldman for his examination. It is further averred that Respondent did not refuse to testify but rather that Special Agent Feldman refused to administer an oath to Respondent, even though Respondent specifically requested that he do same.

SECOND DEFENSE

3. The Petition does not state a claim upon which relief can be granted.

THIRD DEFENSE

4. The documents described in paragraphs 1 and 2 of the purported summons are the property of Morris Goldsmith.

5. The documents described in paragraph 3 of the

purported summons are the property of Sally Goldsmith.

6. Morris Goldsmith has the legal right to indefinite possession of the documents described in paragraphs 1 and 2 of the purported summons.

7. Sally Goldsmith has the legal right to indefinite possession of the documents described in paragraphs 1 and 2 of the purported summons.

8. The documents described in the purported summons were personally given to respondent by Morris Goldsmith on behalf of himself and his wife, Sally Goldsmith.

9. Respondent is the attorney for Morris Goldsmith and Sally Goldsmith, and the said documents were given to him as attorney for the said Morris Goldsmith and Sally Goldsmith.

10. Special Agent Alan M. Feldman is conducting his investigation for the purpose of bringing and obtaining evidence for a criminal prosecution.

11. Disclosure of the said documents by respondent as demanded in the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith not to incriminate themselves.

FOURTH DEFENSE

12. Paragraphs 4 through 11 of this Answer are incorporated herein by reference.

13. Disclosure of the documents demanded in the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith to communicate in confidence with respondent as their attorney.

FIFTH DEFENSE

14. Paragraphs 4 through 11 of this Answer are incorporated herein by reference.

15. Enforcement of the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith not to be required to give up possession to the State of things within their control without the requirements of the Fourth Amendment being satisfied.

SIXTH DEFENSE

16. Paragraphs 4 through 10 of this Answer are incorporated herein by reference.

17. The purported summons was not lawfully issued and is legally null and void.

SEVENTH DEFENSE

18. The documents described in Paragraph 2 of the purported summons are not properly the subject of a summons for the additional reason that they are already in the possession of the Internal Revenue Service or the United States can obtain the documents directly from third parties other than the taxpayer or a person standing in a privileged relation to the taxpayer.

WHEREFORE, Respondent prays that this Court dismiss with prejudice the Petition of the United States and Alan M. Feldman and declare that the purported summons is not legally enforceable and that it is null and void.

/s/ Richard L. Bazelon
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109
Attorney for Solomon Fisher

Of Counsel:

DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN

Dated: February 25, 1972

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

AMENDED PETITION TO INTERVENE

COME NOW, Morris Goldsmith and Sally Goldsmith, and respectfully move that this Court permit them to intervene pursuant to Rules 24(a)(2) and (b)(2) of the Federal Rules of Civil Procedure. In support of this request Petitioners represent that

1. They are the individual taxpayers whose records are being sought by the purported summons which the United States and Special Agent Feldman seek to enforce.

2. The records described in the summons were given by them to their attorney, Solomon Fisher, in confidence for the purpose of obtaining legal opinion and advice, at some time prior to the issuance of the summons.

3. The records described in the summons belong to Petitioners, and they have the right to indefinite possession of the records.

4. The records described in the summons are sought by the United States and Special Agent Feldman for the purposes of bringing and being used in a criminal prosecution against one or both of the individual Petitioners.

5. Production of the record described in the summons will violate Petitioners' right against self-incrimination, their right to confidential communication with their attorney, and their right not to have documents under their control given to the United States under compulsion without observance of the procedures and protections of the Fourth Amendment.

6. The intervention of Petitioners will not prejudice or delay the adjudication of the rights of the original parties to this proceeding.

Petitioners adopt Respondent's Answer to the Petition

To Enforce Internal Revenue Summons as the responsive pleading they will file if permitted to intervene.

/s/ Richard L. Bazelon
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109

Attorney for Morris Goldsmith and Sally Goldsmith

Of Counsel:
DILWORTH, PAXSON, KALISH, LEVY & COLEMAN

Dated: March 2, 1972

(Affidavits of Taxpayers Omitted.)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

Before HON. JOHN MORGAN DAVIS, J.,

Philadelphia, Pa., March 3, 1972

Present: JAMES SOMMAR, Esq.
RICHARD A. SCULLY, Esq.
for the Government

RICHARD L. BAZELON, Esq.
for the Defendant

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[1]

Colloquy

[2] THE COURT: You are representing the United States Government, Mr. Sommar?

MR. SOMMAR: Yes. At this time I would like to introduce the Department of Justice attorney who will handle the total litigation, Richard Scully.

THE COURT: We will admit you for the purpose of this case, Mr. Scully. Mr. Bazelon.

MR. BAZELON: Yes, your Honor. I am here this morning with Mr. Fisher and your Honor, Mr. Fisher and I have been giving some thought to a problem which we would like to advise the Court of before we proceed any further. I think Mr. Fisher would want to direct himself to it, inasmuch as it involves him personally.

THE COURT: Aren't you worried about the adage relating to a lawyer who is his own client?

MR. FISHER: We have considered that, your Honor. We have also considered the problem of the Canons and Code of Professional Responsibility, and that is I may be placed in a situation where I may be a witness in this case as well as being counsel, and that is indicated to be improper, with some exceptions, under the disciplinary rules.

Mr. Scully and I have spoken on the telephone after he arrived in town this morning, and I think we have agreed as being true what I would have testified to. So if I [3] might read into the record the facts to which we stipulate.

THE COURT: I was hopeful you might be able to stipulate as to most of the facts involved.

MR. FISHER: I think there is only one factual issue to be determined in this case and that is the ownership of the records in question.

THE COURT: Why don't you proceed with your stipulation and then if Mr. Scully agrees to it, I will decide whether I can approve it.

Colloquy

MR. FISHER: All right. The stipulation is as follows: that I am a member of the Bar of the Commonwealth of Pennsylvania and the District of Columbia, that I was an attorney with the Tax Division of the United States Department of Justice from 1960 through 1964, and from that date to the present I have been practicing with the firm of Dilworth, Paxson, Kalish, Levy and Coleman, of which firm I am presently a partner, and that I specialize in matters of income taxation.

On August 3, 1971 I was retained to represent Morris Goldsmith and Sally Goldsmith, and that on August 17, 1971 Morris Goldsmith and Sally Goldsmith turned over to me certain records which I now have in my possession. Such records were turned over to me for my use in representing them, [4] furnishing them with legal advice, and from the time those records were turned over to me to the present time I have been using them for that purpose.

In addition to that, I received a summons, which is an exhibit to the Government's petition in this case, on December 1, 1971. In compliance with the summons I reported on December 13, 1971 to the place there designated and I brought with me any records which might fit within the description contained in the summons which were in my possession.

I had previously to that date indicated to Special Agent Feldman that I would not turn over the records to him for inspection, although I would bring them with me in compliance with the summons. When I reached the office there was no stenographer present nor was there any attempt to swear me in as a witness. The only thing that took place was that the Government representative ascertained that I would not allow them to inspect the record, and I think that is the stipulation.

Your Honor, may I explain a moment why the latter part is in here. I am somewhat concerned professionally with the allegation that I refused to testify and I just want the record to be perfectly clear as to what occurred.

THE COURT: Do you agree to that as a stipulation of counsel, Mr. Scully?

[5] MR. SCULLY: Yes, sir.

THE COURT: Thank you, Mr. Scully. I will approve it.

MR. SCULLY: I don't know if counsel wants to go forward any further with their ethical objection.

MR. BAZELON: No, Your Honor. That solves that problem. We think, your Honor, that the next order of business is the petition to intervene of Morris Goldsmith and Sally Goldsmith which we filed and served on the Government last Friday and filed yesterday with your Honor. We feel that they are necessary parties to the case. We have submitted memoranda and the Government has submitted a memoranda as well.

In addition, your Honor, I would like to present you with an amended petition which only changes one phrase with respect to the second averment, if I may hand this up, to make absolutely clear that what I think was also part of the stipulation, although I don't recall the exact wording, but that these records were turned over to Attorney Fisher in confidence for the purpose of his rendering legal advice to the Goldsmiths.

Now, your Honor, I feel that in this case there are substantial constitutional questions. This is a case in which the records were in the hands of the taxpayer's attorney and at the very least we feel that they have the status, the [6] same status that they would have had in the hands of the taxpayer, and that, therefore, the taxpayer's important constitutional rights under the Fourth Amendment and particularly under the Fifth Amendment, as well as the attorney-client privilege to the extent that that is involved, are in this case, your Honor, and it is very important, and, in fact, may well be necessary that they be asserted by the taxpayer, inasmuch as these are their rights.

Now, as I understand, your Honor, the Government

memorandum against our petition to intervene, the Government does not dispute that this is the appropriate time and form [sic] to litigate those rights. The Government's position, as I understand it, is that we should be put to proof of all of the allegations in the petition to intervene.

Your Honor, the allegations in the petition to intervene go to the relationship of the taxpayer to these records. They are the core of the issue that is going to be before you in this hearing. We suggest that to have two hearings on the same issue does make sense and we therefore think, your Honor, that all of this should be litigated at one time with the taxpayers as parties who are in a position to raise and protect their rights.

THE COURT: Mr. Scully.

[7] MR. SCULLY: The Government, of course, opposes the rights of these taxpayers to intervene in this particular matter. I would agree there is no sense in having the question litigated twice. However, I believe it can be litigated only once no matter who is required to go forward with the proof that is involved.

The Government's position is, and I think respondents' counsel—

THE COURT: I don't mind telling you, Mr. Scully, that my inclination is to permit the intervention, so that it is up to you to argue that point to my satisfaction to stop my granting the petition.

MR. SCULLY: Yes, sir. Well, I would like to briefly, the most recent pronouncement of the Supreme Court in the summons enforcement area is in the United States vs. Donaldson, which specifically goes to the issue of the intervention of taxpayers in a summons proceeding where a summons is directed at a third party.

Now, the Donaldson case and Reisman vs. Caplan which went before it do recognize the right of a taxpayer to intervene under certain circumstances, and two that are enumerated and which seem to be involved in this case are

THE COURT: I am familar with the Donaldson case.

[8] MR. SCULLY: The two issues to be raised, improper corpus of the summons, it appears that issue has already been raised by the respondent and can be resolved without the taxpayer's participation.

With respect to the question as to whether the taxpayers have any interest in the materials which are sought to be produced, we believe that under the Supreme Court decision in United States vs. Powell, the taxpayers have the burden of doing more than merely alleging that these are their records. Powell involved a situation where there was an allegation of improper purpose. The Court said the taxpayer had to do more that alleges, had to come forward with affirmative proof. We would say this applied as well to the situation where the taxpayers claim an interest by virtue of their interest in the property sought to be produced. Otherwise the Donaldson opinion has no real effect because the taxpayer would be allowed to intervene merely on an allegation of interest.

MR. BAZELON: Your Honor, if I may respond just briefly.

THE COURT: You may. You are familiar with this Donaldson case too?

MR. BAZELON: Yes, I am, your Honor. In fact, we quote and rely on the Donaldson case, along with other [9] cases.

Your Honor, the Donaldson case involved a situation where the taxpayer admitted that there was no substantial constitutional question, that he had no claim to any property rights to the documents being sought. It is a situation which has no bearing on the case before your Honor where there is a very substantial question as to the rights of the taxpayer in these records, and the records were neither in the hands of the taxpayer or in the hands of his attorney in the Donaldson case, and the Court explicitly recognized that and limited its holding to the facts before it and then went on to approve the language in the prior Reisman case in which intervention had been allowed.

Given the fact that there is a substantial issue of ownership in this case, while the Government does not agree with our position, I think that the Government would recognize in the allegations contained in the petition that it is far from a frivolous issue. The Court's pronouncement in Donaldson is, as I read it, is that where there are substantial constitutional questions which involve the taxpayer's rights, the taxpayers should be part of the proceeding, and that is the position we take.

MR. SCULLY: I have only one more thing I would like to point out the Court. Since the issue is the ownership [10] or right to possession of accountant's work papers in this case, under Pennsylvania law, 63 Pa. Statutes Section 9.11, working papers of an accountant are presumed to be the property of the accountant, absent an express agreement to the contrary. So I would think that unless the taxpayers can make a prima facie showing of property right in these work papers, they haven't met the substantial interest requirement of Donaldson.

MR. BAZELON: Your Honor, we are well aware of the statute that is referred to, and that may be relevant to the question of what property rights exist. It is relevant to the evidentiary hearing.

The statute does have a provision about express agreement. It also has a provision concerning whether or not the records have been submitted to the taxpayer by the accountant. These are matters which should be gone into in an evidentiary hearing in which the taxpayers are participating as parties.

THE COURT: I have read Donaldson several times and I don't think it really has any bearing on the question of whether or not the taxpayer had the right to intervene in this matter, and on that basis I will allow the intervention.

Now, as to the other matters which are important to you, Mr. Scully, and to the I.R.S., I am perfectly happy to hear the whole case which that fact involves. I am allowing

[11] the intervention. Now you can proceed with the rest of the case.

MR. SCULLY: The Government calls Alan M. Feldman.

ALAN MORRIS FELDMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULLY:

Q Mr. Feldman, by whom are you employed?
A Internal Revenue Service, Intelligence Division.
Q And what is your capacity?
A Special Agent.
Q How long have you been a Special Agent?
A A little more than two and one half years.
Q In your capacity as a Special Agent of the Internal Revenue Service were you assigned to investigate the tax liabilities of Morris Goldsmith?
A Yes, I was.
Q What years were you assigned to investigate?
A 1969 and 1970.
Q In the course of your investigation did you contact Mr. Harold Berson?
A Yes, I did.
Q How did you come about contacting Mr. Berson?

[12]

A Mr. Berson is known to have been the accountant and returns preparer for Mr. Goldsmith.
Q After contacting Mr. Berson did it become apparent to you that there were certain materials prepared by him that you thought should be examined?
A Yes.
Q Could you describe those materials?
A During the interview with Mr. Berson he stated he prepared analysis of receipts and disbursements.

MR. FISHER: I object, your Honor, to anything Mr. Berson may have said.

THE COURT: On what basis?

MR. FISHER: It is hearsay.

THE COURT: It certainly is hearsay, but it is part of the entire proceeding.

MR. FISHER: Mr. Berson is here in court today under Government summons.

THE COURT: Well then you can refute it. I will permit the witness to testify.

MR. FELDMAN: I was told that the analysis of receipts and disbursements were used to prepare the tax returns as filed.

MR. SCULLY: Your Honor, before we go any further, can I get a clarification as to who is representing the [13] respondent for the purposes of this hearing?

MR. BAZELON: Yes, your Honor, I think the way we will proceed, if it is acceptable to your Honor, is that now that we have resolved the problem of any conflict or, hopefully, of any problem with the Canons of Ethics, that Mr. Fisher will proceed to examine and cross examine witnesses.

THE COURT: Do you have any objection to that, Mr. Scully?

MR. SCULLY: I have no objection as long as it is one or the other.

THE COURT: Yes, it has to be one of you.

MR. BAZELON: Yes, your Honor, we realize that.

THE COURT: And Mr. Fisher is going to conduct any further examination or handling of any cross examination?

MR. FISHER: That is correct, your Honor.

MR. SCULLY: I have no objection to that, your Honor.

BY MR. SCULLY:

Q I take it you learned of the existence of these materials from Mr. Berson himself?
A That's correct.
Q And did he tell you how these materials were prepared?
A Yes, he did.
Q And how was that?
A At the end of the year Mr. Goldsmith would bring in his cancelled [14] checks and deposit slips and from these he would prepare an analysis of receipts and disbursements and then prepare tax returns from this analysis.
Q And had he done this for Mrs. Goldsmith as well?
A Yes, that's correct.
Q Did you ask Mr. Berson to produce the work papers?
A Yes, I did.
Q And did he do so?
A No, he did not.
Q Did you—I would like to have this marked for identification. (G-1, being a summons directed to Harold Berson, was marked for identification.)

BY MR. SCULLY:

Q Mr. Feldman, I show you Government exhibit one for identification and ask you if you could identify it?
A Yes, I can.
Q And would you identify it for the Court please?
A Yes, I prepared this.
Q Would you describe what it is?
A It's an Internal Revenue Service summons, Form 2039.
Q And to whom is it directed?
A Harold Berson, C.P.A.
Q Did you serve this summons on Mr. Berson?
A Yes, I did.

[15] MR. SCULLY: I would like to offer this in evidence.

THE COURT: Thank you.

BY MR. SCULLY:

Q At the time you served this summons, Government's exhibit one, on Mr. Berson, did he comply with the summons and furnish the material sought therein?
A No, he did not furnish the materials.
Q Specifically referring to the work papers that were sought in the summons, did he give you any reason for not producing them?
A Yes, he did.
Q And what was that?
A Mr. Berson told me that subsequent to my contacting him Mr. Goldsmith had told him that he was under investigation by the Internal Revenue Service and that he asked if he could show the work papers to his attorney and Mr. Berson gave him the work papers.
Q Now, the summons has a return date of 3rd November, 1971. Did you——if Mr. Berson no longer had the papers in his possession, why did you put a return date of November 3rd on the summons?
A The summons is due within ten days and Mr. Berson said that he would contact Mr. Fisher and ask for the return of his records in compliance with the summons.
Q Now, did Mr. Berson appear pursuant to the summons on the 3rd of November, 1971?
A There was a misunderstanding on that point. I told Mr. Berson [16] that if the information was not available or if he was unable to get hold of the work papers as I had summoned, then he need not appear as I had already interviewed Mr. Berson, and there was a misunderstanding and Mr. Berson appeared at our office on that day and I was at that time not in and I didn't see him, but I did call him later that day.
Q You did call him after he had appeared at the office?
A That's correct.

Q And did he advise you as to whether or not he had been able to obtain the work papers?
A He advised me he was unable to obtain them.
Q Did he advise you he made an effort to obtain them?
A Yes, he did.
Q And did he advise you he considered the work papers to be his property at the time?
A Yes, he did.
Q Did he also advise you he considered the work papers to be his property when you first served the summons on him?
A Yes, he did.
Q After November 3rd when Mr. Berson advised you he did not have the records, I believe he said Mr. Fisher had them at that point?
A Yes.
Q What did you do with respect to obtaining them from Mr. Fisher?
A At that point I did nothing. Mr. Fisher prior to that time had [17] informed me that he had records in his possession and that after he would review these records he said he may make certain available to the Service and I was hoping for those records rather than having to serve a summons.
Q And did he at any time produce any papers for your inspection?
A No, he did not.

MR. SCULLY: Your Honor, at this time I would like to have marked for identification the original summons served to the respondent, Mr. Fisher, which is part of the Court's file, having been attached to the petition in this case.

THE COURT: We are talking about what, G-1?

MR. SCULLY: No, sir. This is an additional summons and one that was served on Mr. Fisher.

MR. FISHER: I have no objection to his using a copy if it makes it easier.

THE COURT: Do you have a copy?

(G-2 being a summons directed to Solomon Fisher, was marked for identification.)

BY MR. SCULLY:

Q Mr. Feldman, I show you Government exhibit 2 for identification and ask you if you can identify it please?
A Yes, I can identify this.
Q Would you state for the record what it is?
A It is the Internal Revenue Service summons to Solomon Fisher, Esq., [18] Form 2039.
Q And did you serve this upon Mr. Fisher?
A Yes, I did.
Q And what date did you serve it?
A December 1, 1971.

MR. SCULLY: I would like to offer this as Government's exhibit 2.

THE COURT: It may be admitted.

BY MR. SCULLY:

Q Why did you feel it was necessary at this particular point to serve this summons on Mr. Fisher?
A Between the time I first contacted Mr. Fisher and the time I served this summons, Mr. Fisher had told me he was going to review Mr. Goldsmith's records and he may make certain records available, and I was hoping at this time to get the records prior to issuing a summons, but on the same date as the issuance of the summons, I phoned Mr. Fisher again asking him for the records he said he may make available, and Mr. Fisher informed me he was no longer going to represent Mr. Goldsmith and he was going to return the records to Mr. Goldsmith and, as far as he was concerned, I could contact Mr. Goldsmith.

Q At this point you served the summons on Mr. Fisher?
A Yes, I did.
Q And did Mr. Fisher appear pursuant to that summons?
[19]
A Yes, he did.
Q Did he produce the records sought there?
A No, he did not.
Q Could you tell the Court why the work papers sought in the summons are necessary in order to complete your investigation on the tax liabilities involved?
A Well, the tax returns themselves were prepared from the work papers and one of the aspects would be to tie in the work papers to the tax returns. The point is they may show other areas of taxpayer income that Mr. Goldsmith may have.
Q Now, one of the sets of documents that you were seeking and is listed in the summons are retained copies of withholding tax returns, is it not?
A That's correct.
Q And have you since that time been able to obtain similar copies from other sources?
A Yes, I have.
Q So you are no longer seeking this particular document?
A That's correct.
Q After this case was assigned to you did you contact the taxpayer, Morris Goldsmith?
A Not Morris Goldsmith. I tried to. I contacted his wife.
Q And were you at any time able to reach Mr. Goldsmith?
A No, I was not.
[20]
Q Did you speak with him on the phone?
A Yes, the day after I contacted Mr. Goldsmith's wife he telephoned me.
Q Do you recall the date you spoke with him?
A I think it was July 30, 1971.
Q And what was the purpose of that telephone call?
A I had contacted Mrs. Goldsmith the day before hoping

to find Mr. Goldsmith, and at that time I left a message asking Mr. Goldsmith to call me, and the next day he called me.
Q At that time did you advise Mr. Goldsmith of your identity?
A Yes, I did.
Q And your position with the Internal Revenue Service?
A Yes, I did.
Q And can you tell me what else you advised him?
A I told Mr. Goldsmith that I would like to make an appointment to discuss his tax liabilities.
Q And did you, in fact, make an appointment with Mr. Goldsmith?
A Yes, we did.
Q Was that appointment kept?
A No, it was not.
Q Can you tell the Court why?
A I was contacted by Mr. Fisher and Mr. Fisher told me he was representing Mr. Goldsmith and that Mr. Goldsmith would not appear for that appointment.
[21]
Q And do you recall the date that you were contacted by Mr. Fisher?
A I think it was August 3rd.
Q Just to clarify and make perfectly clear this particular point, you did advise Mr. Goldsmith when you spoke with him that you were conducting an investigation into his tax liabilities?
A Yes, I did.

MR. SCULLY: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. FISHER:
Q Mr. Feldman, what was the date on which you first contacted Mr. Berson?
A I think it was October 22, 1971.

A. M. Feldman—Cross

Q I don't want to speculate. Do we know that is the date?
A That is the date I interviewed Mr. Berson. I am not sure whether I called and made an appointment or not.
Q I believe we already stipulated the records were delivered to me on August 17, 1971. Now won't you agree that that was before you contacted Mr. Berson?
A Yes.
Q Didn't you testify just a few minutes ago that Mr. Berson delivered the records to me after you contacted him?

[22]

A No, he said that some time before I contacted him.
Q So that if you did testify that way it was an error, is that correct?
A Yes.
Q Now, do I understand that does the Government now agree that with respect to this enforcement proceeding it only relates to items one and three of the summons which was served on me and item two no longer is part of this case?

MR. SCULLY: That is correct.

BY MR. FISHER:

Q Mr. Feldman, you indicated that you work for the Intelligence Division?
A That's correct.
Q Is there something also known as the Audit Division?
A That's correct.
Q And they are two separate divisions within the I.R.S.?
A That's correct.
Q And am I correct in saying that it is the general function of the Audit Division to conduct audits in order to ascertain the civil liability of a taxpayer?
A I am not sure if that is the correct function. I haven't read the exact function of that.

A. M. Feldman—Cross

Q Have you brought with you any manuals pursuant to a subpoena that was served upon you?

[23]

A Just my handbook.
Q Does that contain in that handbook the various functions of the different departments of the Internal Revenue Service?
A No, it doesn't.
Q Do you ever conduct a joint investigation with a revenue agent?
A Yes.
Q And a revenue agent, just to clarify the terminology, a revenue agent is a person in the Audit Division and a Special Agent is one who is in the Intelligence Division, is that correct?
A That's correct.
Q Now, having worked with the revenue agents, and knowing that in many cases they work independent of special agents, could you tell us whether or not you know whether or not it is their job to investigate and determine civil tax liability?
A I imagine that is part of their job.
Q What else is their job?
A Among other things they determine the tax to be levied on levy assessments, and I am not aware——I know there are other jobs. I am not really familiar with all of the jobs of the revenue agent.
Q Is there also a collection division, Mr. Feldman?
A Yes, that's correct.
Q Isn't it the Collection Division's responsibility to levy?
A They make the levy. They actually seize the property.

[24]

Q The revenue agent determines the liability and the revenue officer, which is a different department, the Collection Department, he is the one who actually enforces the levy?
A That's right.

Q So so far all we have been able to determine is that the revenue agents' responsibility is to determine tax liability. Is there anything else?

A I am not sure.

Q So to the best of your knowledge that is all that they do, is that correct?

A They determine tax liability, that's correct.

Q Now, in many cases is it true that a special agent makes a joint investigation with a revenue agent?

A That's correct.

Q Is there a revenue agent conducting this investigation of Morris Goldsmith with you?

A No.

Q Would you tell us the reason for that?

A It has not proceeded to a point where we would feel it would be necessary to ask a revenue agent's assistance.

Q Would you say then, sir, that your investigation is in its preliminary stages?

A That's correct.

Q What determination do you make as to whether or not the [25] investigation goes beyond a preliminary stage? What is the criteria?

A Whether or not I feel there is more income than Mr. Goldsmith is reporting on his returns.

Q So that if you determine Mr. Goldsmith had more income, even though you determined it was not in any way related to fraud, would you continue your investigation or would you withdraw from the case?

A It would depend upon the individual circumstances. I don't know.

Q So, in other words, you may continue on a case under your own internal procedures even after you have made a determination there is no criminal violation of the Internal Revenue Laws?

A Yes, I may.

Q Would you look at your handbook and see if your handbook states that the criteria is that you are to

withdraw from a case if it is determined that there is no criminal responsibility?

MR. SCULLY: I would object to that question. We are talking about something that is going to happen in the future. What we are concerned with is the present status of the investigation and not what may some time occur or not occur.

MR. FISHER: If I may, your Honor, as I understand the procedure used by the Internal Revenue Service as applicable in this case at this moment, it is Mr. Feldman's job to determine [26] whether or not there are sufficient facts to enable him to continue in this case to make a criminal fraud investigation. I think that is the issue. I want to clearly point out to the Court that no revenue agent is in this case whose responsibility it normally is to determine the tax liability of the taxpayer, that this is a very preliminary inquiry to determine criminal liability, and that the usual people are not here who determine civil liability.

MR. SCULLY: Your Honor, it has not been determined at this point that Mr. Feldman is not authorized or empowered to inquire into civil tax liability. The whole point of this investigation is to find out if there has been additional income and additional tax liability whether there is any evidence of fraud or not.

MR. FISHER: I submit that is counsel testifying and not Mr. Feldman testifying.

THE COURT: Well, it is necessary to hear it from somebody. Why don't you explore it?

MR. FISHER: That is what I was trying to do.

THE COURT: Why don't you do it?

MR. FISHER: Would you read back the last question?

(Last question read by court reporter.)

[27]

BY MR. FISHER:

Q Would you look at your handbook, Mr. Feldman?

MR. SCULLY: Perhaps it would facilitate matters if we could determine whether there is any such section or language in the handbook that he should refer to.

MR. FISHER: Do you know the answer?

THE COURT: I don't see how counsel could know what is in the handbook. Mr. Feldman would certainly be much better equipped to pick out of the handbook what he needs to answer the question.

MR. SCULLY: Yes, sir. I would suggest he be asked if he can find the answer in a handbook.

MR. FELDMAN: I am not sure that I can. I know that my position is to——

THE COURT: It is your handbook.

MR. FELDMAN: Well, yes, it is, but he is asking a specific section and I am not sure whether that section is in there. In other words, I have not memorized the handbook.

THE COURT: Where would you suggest that it might be found?

MR. FELDMAN: Well, probably in the Internal Revenue Service Manual. Since this is the section, it probably is in here somewhere, the criteria for withdrawing from an investigation.

THE COURT: It is your handbook. You tell us [28] whether you can find it. I think it is a perfectly proper question.

MR. FELDMAN: This section deals with withdrawals, but it states that except under circumstances outlined in

3 below, a special agent shall withdraw from a full scale investigation. The only difference is I have not reached that stage. It is not a full scale investigation.

BY MR. FISHER:

Q Mr. Feldman, is there anything in there about the conduct during the course of the preliminary stages of your investigation?

THE COURT: Does your handbook tell you that you work for the Secretary of the Treasury, Mr. Feldman?

MR. FELDMAN: I imagine it does, your Honor. In other words, I am not familiar with the entire handbook. I imagine in there it would state for whom I do work, but this section on Planning and Conducting Preliminary Investigations——

THE COURT: The reason I ask, the statute is very clear. It authorizes the Secretary or his delegate, officers or employees of the Treasury Department to proceed. Are you familiar with Section 5602, Mr. Fisher?

MR. FISHER: Is that the summons provision, your Honor?

THE COURT: Yes.

[29] MR. FISHER: I would agree the regulations under that section——

THE COURT: I don't really know what we are fighting about. If this is correct——

MR. FISHER: The cases say, your Honor, first of all, let me go further from the statute. I will admit that the regulations of the Internal Revenue Service that are issued under that section delegate, purport to delegate the authority to issue summons to the special agents of the Internal Revenue Service.

THE COURT: That's right.

MR. FISHER: However, the cases say that summonses being used for the purpose of a criminal investigation and not jointly for a civil and criminal investigation, that the summons, even though the specific authority to issue it is in the regulations, but the summons is not proper, and that, of course, is the point that I am trying to raise.

THE COURT: Do you have a case on that point?

MR. FISHER: Yes, sir. If you would just give me one moment, your Honor.

THE COURT: Well, the Donaldson case does read, "We hold an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

Now, certainly this is prior to any criminal [30] prosecution or recommendation, right?

MR. FISHER: That is correct, sir.

THE COURT: Now, doesn't the Donaldson case state clearly that Section 7602 is valid?

MR. FISHER: Yes, sir, but I think that the other cases when read in conjunction with Donaldson, and the cases are not overruled by Donaldson——

THE COURT: Donaldson is 1970.

MR. FISHER: Yes, I know, but the Supreme Court did come out and say, and I think if you read Donaldson in connection with the Supreme Court decision that preceded it and the cases cited with approval by the Supreme Court, there are cases that say when you can establish that the sole purpose of the investigation is to ascertain evidence for a criminal prosecution, it is not a valid purpose within the meaning of the statute.

THE COURT: You haven't brought that out yet. Are you going to?

MR. FISHER: I am trying to, your Honor.

THE COURT: I don't know why you are trying. Find out.

BY MR. FISHER:

Q Mr. Feldman, you haven't been able to find the standard I have referred to?

A I have a section marked preliminary investigation, but there is [31] no section as you requested.

Q In a normal case, Mr. Feldman, doesn't the investigation usually commence with a special agent and a revenue agent working jointly?

A No, it does not. You mean in intelligence?

Q Yes. Would you say that more often than not a case starts with a special agent working by himself?

A That's correct.

Q When a special agent is working by himself and he visits a person who is under investigation doesn't he say the following to him: "I am a special agent of the Internal Revenue Service, but as a special agent it is my duty to investigate the possibility of criminal tax fraud and in connection with the investigation of your returns you have a right under the Fifth Amendment of the Constitution of the United States not to answer any questions or submit any information if the answers or information might incriminate you in any way"?

A In essence that is what it does say.

Q You are requred by your own internal rules to make that statement, is that correct?

A That's correct.

Q And you further state to a person under investigation that any answers he gives or any information he submits might be used against him in any criminal proceeding which might be undertaken?

A That's correct.

[32]

Q And you also tell him he has the right to an attorney, is that correct?

A. M. Feldman—Cross

A That's correct.
Q Now without specifically identifying the source, could you tell us what the reason was that you were asked to investigate or assigned to investigate the tax liability of Morris Goldsmith?
A It was alleged that Mr. Goldsmith may have more income than he is showing on his tax return.
Q Can you tell us whether it was alleged by an individual or by a Government agency?
A Originally it was alleged by an individual.
Q Was it alleged to the Internal Revenue Service by an agency other than the Internal Revenue Service?
A Yes, it was.
Q Could you tell us what that agency is?
A It was a corporation, a publicly held corporation.

THE COURT: A what?

MR. FELDMAN: By an individual in a publicly held corporation.

BY MR. FISHER:

Q In other words, it was not another agency of the Government?
A No, it wasn't.
Q So the recommendation came directly to the Internal Revenue [33] Service from an outside source?
A The recommendation?
Q The information came directly to the Internal Revenue Service?
A To an individual in the Internal Revenue Service.
Q Not to someone outside the Internal Revenue Service?
A That's correct.
Q Mr. Feldman, is the Intelligence Division divided up into some people who specialize in working with specialized kind of cases or with cases that might be considered to be organized crime cases or anything such as that?
A Yes, it is.

A. M. Feldman—Cross

Q Are you in any of those specialized sections?
A No, I am not.
Q Mr. Feldman, in the summons which you served I notice there is a distinct change of language in the summons you served Mr. Berson and the summons which you served upon me. Was there a reason for that?
A May I see the summons?

(Exhibits handed to witness.)

MR. FELDMAN: Could you point out what do you meanby the language?

BY MR. FISHER:

Q The items sought are different?
A The items asked for are different, yes.
[34]
Q So that you did not ask me for the work papers of the accountant, did you?
A No, I did not. I'm sorry, what was that? It says here——
Q Read items one and three, would you?
A Analysis of receipts and disbursements for Morris Goldsmith for 1969 and 1970, copies of payroll tax returns for Morris Goldsmith for 1969 and 1970, and an analysis of receipts and disbursements for Sally Goldsmith for 1969 and 1970.
Q Now, those items are not referred to as the accountants work papers, are they?
A In those lines, no.
Q Well, in your original summons you called something the accountant's work papers, don't you, all work papers?
A All work papers, permanent files.
Q Now, under items one, two and three you have not asked me for work papers, is that correct?
A No. That's correct.
Q I am sorry for asking a negative question. It is correct

that that does not anywhere describe items one, two or three as being the accountant's work papers, is that correct?

A In those specific articles, those numbers, no, but below it it did.

Q Does it say work papers anywhere on that summons, does that language appear?

[35]

A The word work papers does not appear.

Q So nowhere in the summons you served upon me is the word work papers, is that correct?

A The word work papers, no.

Q Mr. Feldman, have you examined the tax returns for the years 1969 and 1970 of Morris Goldsmith?

A I have them in my possession and I haven't made an examination of them, let me put it that way.

Q Physically you have looked at them, is that correct?

A Yes.

Q Do you have them here with you?

A Yes, I do.

Q Do you recall whether Morris Goldsmith filed an individual return or a joint return for those years?

A A joint return for those years.

Q And the tax liability on a joint return is determined jointly, is that correct?

A That's correct.

Q And yet your summons only refers to Morris Goldsmith's tax liability, is that correct?

A That's correct.

Q Is there any way on a joint return that you can ascertain the liability of one taxpayer without determining the income and expenses of the other?

[36]

A For the purposes of my examination, yes. The actual tax liability can be determined in examining one person and not the other.

Q Does the Commissioner have authority to determine a person's tax liability on an individual basis when

that person had filed a joint tax return, Mr. Feldman?

A You are talking about my examination, is that correct?

Q Well, answer the question.

THE COURT: Aren't you asking him for a legal opinion, Mr. Fisher?

MR. FISHER: I think Mr. Feldman tells us one of the purposes of his examination is a civil determination of tax liability and I think I can establish he never for the purpose of determining civil liability where a joint return is filed determines it on an individual basis.

MR. SCULLY: I would like to respond to that. I believe he is asking for a legal conclusion. The fact that there is a joint income tax return may mean that if additional income is found for either husband or wife there will be additional joint liability. However, this does not mean that you can't examine one to find out if he had additional income in and of himself without examining the other. The fact that the other may be liable as a matter of law because he or she signed the return had nothing to do with the investigation of one person or the other.

[37] THE COURT: I didn't think that's what Mr. Fisher meant, but I am trying to find out just what you do mean.

MR. FISHER: Let me rephrase the question on the issue, your Honor.

THE COURT: Fine, I will be glad to have you do that.

BY MR. FISHER:

Q When civil liability of a taxpayer is computed, for example, if you were determining someone's tax liability, and I think that is the language you have used in your affidavit, somebody's tax liability, when a person files a joint return am I correct in stating that the Internal Revenue Service determines the

liability based on the joint items of income and expenses?

A The ending figure would be a joint liability.

Q So that if someone files a joint return the Internal Revenue determines the ultimate tax liability on a joint basis, is that correct?

A The ultimate tax liability is joint.

Q And you make your computations jointly to determine that liability?

A Based on the percentages.

Q I don't want to go through the whole return, but you determined all your percentages and everything are determined on a joint basis, is that correct?

A The liability is.

[38]

Q Well, the medical expense deduction limitation is determined jointly, is that correct?

A That's correct.

Q And the charitable contribution is determined jointly, is that correct, twenty percent of adjusted gross income jointly?

A Right.

Q As a matter of fact, every single one of those computations are determined jointly, is that correct?

A Those computations are.

Q And there are different tax tables in determining tax liability, is that correct?

A That's correct.

Q And there is a special table you use for joint returns, is that correct?

A That's correct.

Q And that would be the one that you would use in connection, in determining the tax liability of Morris Goldsmith for the year, is that correct?

A For Morris and Sally, that's correct.

Q Well, also for Morris because his income is on that return, is that correct?

A Yes.

Q Now, assuming a case goes through the normal civil routine that [39] it goes through in the Internal Revenue Service, am I correct in saying that you could not issue a proposed deficiency letter for Morris alone under these circumstances?

A Would you repeat that?

Q Would you read the question back?

(Question read by court reporter.)

MR. FELDMAN: That would be correct.

BY MR. FISHER:

Q Let's go back to your various conversations with Mr. Berson. I think you testified that Mr. Berson had told you that he had turned the records over to me or to Mr. Goldsmith?

A To Mr. Goldsmith.

Q And did you also testify that that was, that Mr. Berson told you that that was after you first contacted him?

A Prior to. I believe I said prior to.

Q O.K. I just want to make that clear. There was no summons outstanding or, as a matter of fact, you had not even contacted——strike that, I would like to rephrase the question. Isn't it true, Mr. Feldman, that based on the time that Mr. Berson indicated to you he had turned over the records to Mr. Goldsmith that at such time you had never met with the taxpayer, that you had never spoke to Mr. Berson, and that you had not at any time issued any summons to any person with respect to this case?

A I have never met personally with Mr. Goldsmith.

[40]

Q That is correct.

A But I had talked to him on the telephone.

Q That is correct. With that qualification, everything I said is correct?

A Correct.

MR. FISHER: I have no further questions, your Honor.

THE COURT: Thank you. Any redirect?

MR. SCULLY: A few questions, your Honor.

REDIRECT EXAMINATION

BY MR. SCULLY:

Q The question was asked concerning the different language in the two summonses. I would ask you to look at the exhibit G-1 and the exhibit G-2 again. Isn't it a fact that you prepared the summons, G-1, issued to Mr. Berson, before you met and spoke with him?
A That's correct.
Q So you didn't know what papers he might have in his possession at that time?
A That's correct.
Q And isn't it also a fact that by the time you got around to serving a summons on Mr. Fisher that you had ascertained from Mr. Berson just what work papers he had prepared?
A He told me exactly what he had prepared and that is what I put [41] on the summons.
Q He also told you that they were his work papers, did he not?
A That's correct.
Q With respect to the tax returns of Morris and Sally Goldsmith isn't it a fact that there are two schedule Cs attached to that return, one for Morris Goldsmith's professional business income and one for Sally Goldsmith's professional business income?
A That's correct.
Q And isn't it quite possible that you can have an adjustment of the ultimate tax liability if there is an additional income applicable to one or the other schedule C?

A That's correct.

MR. SCULLY: I have no further questions.

THE COURT: Recross?

MR. FISHER: Yes, one or two please, your Honor.

RECROSS EXAMINATION

BY MR. FISHER:

Q Did you speak with Mr. Berson prior to the time you visited with him?
A If I did it was only to make an appointment.
Q So that your testimony is that the date that is shown on your summons that you served him was the first date, other than making an appointment, was the first date that you had any substantive [42] conversation with Mr. Berson, is that correct?
A That's correct.
Q Now, in the course of your two and one half years investigation or two and one half years employment by the Internal Revenue Service you had had occasion to investigate a number of taxpayers?
A That's correct.
Q To examine books and records of a number of taxpayers?
A That's correct.
Q Cash receipts and cash disbursements are only one item of books, is that correct?
A Of the taxpayer?
Q Yes.
A It would depend on the taxpayer.
Q Isn't it possible there is more than one book?
A Yes.
Q More than a cash receipts book and a cash disbursements book?
A Certainly.

Q Don't many taxpayers keep their own cash receipts and cash disbursements book?
A That's correct.
Q As a matter of fact, don't accountants have their own work papers which are not necessarily the same thing as cash receipts and cash disbursements?

[43]

A They may have.
Q That is correct, what I said is correct?
A They may have. They may have others, yes.
Q Are you willing to accept that there is a difference between accountants work papers and cash receipts and cash disbursements records?
A No.
Q You think they are all the same, is that correct?
A They may be the same depending upon the circumstances.
Q And they may be different, is that correct?
A They may be different, that's correct.

MR. FISHER: I have no further questions.

THE COURT: Redirect?

MR. SCULLY: Nothing further.

THE COURT: Thank you, Mr. Feldman.

(Witness leaves stand.)

MR. SCULLY: The Government calls Mr. Harold Berson.

THE COURT: Gentlemen, may I see counsel?

(Unreported sidebar conference follows.)

HAROLD BERSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[44]

BY MR. SCULLY:

Q Would you state your address, Mr. Berson?
A I reside at 210 Rydal West in Jenkintown.
Q What is your occupation, sir?

THE COURT: Rydal West, that's an apartment house, Mr. Berson?

MR. BERSON: Yes.

THE COURT: Where is it located?

MR. BERSON: It is on the Fairway opposite Wanamaker's. I don't have a number. It's an apartment.

THE COURT: Is it on Old York Road?

MR. BERSON: It's off Old York Road.

BY MR. SCULLY:

Q What is your occupation, sir?
A I am a Certified Public Accountant.

THE COURT: Would you keep your voice up please because I don't think anyone in the room could hear you. You are directing your voice to me and I don't hear you very well.

BY MR. SCULLY:

Q Do you have your own accounting firm, Mr. Berson?
A Yes, I do.
Q Are you acquainted with Morris Goldsmith?

[45]

A Yes, I a[illegible]

Q And how long have you known him?
A Oh, between twenty and thirty years.
Q Have you performed accounting services for Mr. Goldsmith?
A Yes, I have.
Q And also for his wife?
A Yes, I have.
Q And could you describe the accounting services that you have performed for him generally?
A We prepare their returns each year from summaries or records that are kept from their cancelled checks and deposits that they make during the year.
Q And did you perform these services for the taxpayer, Morris Goldsmith, for 1969 and for 1970?
A Not personally, but I directed the work that was done.
Q I see. Now, were these services performed in the position of an independent accountant rather than as an employee of Mr. Goldsmith?
A It is an unusual aspect of this type of accounting service because there is a write-up involved which we don't do for everybody. Well, you have a split personality because as you are writing up work for them you are doing sort of a bookkeeping service and you would be an employee per se, even though you are not on the [46] payroll that way, and on top of that you would have the accounting work which is getting the figures together for the return.
Q How do you will Mr. Goldsmith, on an hourly basis?
A No, we work on a yearly fee that includes whatever charges are made for the year.
Q Mr. Goldsmith, I will show you Government's exhibit——

MR. FISHER: Mr. Berson.

BY MR. SCULLY:

Q Excuse me, Mr. Berson, I show you Government's exhibit number two and ask you to look at the materials that are sought by the summons described in paragraphs one, two and three?

A Yes.
Q Did you or your firm prepare those materials?
A Yes.
Q And were they kept in the possession of yourself or your firm after the tax returns were filed?
A Just for certain periods. Records were always returned to clients after three or four years. The accumulation gets out of hand.
Q In respect to those documents referred to for 1969 and 1970 how long were they retained by yourself or your firm?
A Well, on the request by Mr. Goldsmith in the early part of August, stating that he wanted to have the records examined by his attorney because he felt that something was going on that he wanted [47] to get to his attorney, we gave the balance of what we had to him.
Q And did he tell you what that something that was going on was?
A Just that he suspected something about an investigation, but he did not know for sure.
Q Did he tell you by whom the investigation was being made?
A No, he didn't, no.
Q And do you recall what date in August he requested that you turn the papers over to him?
A It was the early part of August. I could not honestly tell you the exact date.
Q Do you recall being visited by Special Agent Feldman on October 22, 1971?
A I don't remember the exact date, but I know he was there.
Q At that time did he ask you what services you had performed for Mr. Goldsmith?
A Yes.
Q And did you describe the services?
A I believe I did.

Q And also the papers that you had prepared in the course of performing those services?

A Yes.

Q And did you also tell him that you had turned the specific papers, certain of the papers over to Mr. Goldsmith at his request?

A Yes, I did.

[48]

Q I believe on that date Mr. Feldman also served a summons upon you, did he not?

A Yes, he did.

Q And did you agree to obtain the work papers that you had discussed with him from Mr. Goldsmith in order to comply with that summons?

A The word agree is a relative word. I said I would speak to Mr. Goldsmith and find out whether he could return the records to me.

Q Did you also tell him that you would contact Mr. Fisher concerning the records?

A That I don't remember. He did serve the summons which stated on a certain date I was to come up with the records.

Q In the course of performing your services for Mr. and Mrs. Goldsmith were you retained directly by them?

A Yes.

Q In other words you were not hired or retained by Mr. Fisher, were you?

A No.

Q And have you ever performed any services for Mr. and Mrs. Goldsmith at the request of Mr. Fisher?

A No, I didn't.

Q Did you contact Mr. Fisher with respect to these work papers and ask that he return them to you?

[49]

A I contacted Mr. Goldsmith and told him that I would like to get the papers back, that I was requested by the Government to bring them to their offices.

Q Did you, do you recall a conversation with Special

Agent Feldman on the telephone on November 3, 1971?

A Try to refresh my memory. I really couldn't tell you at this moment.

Q That was the return date of the summons that was served upon you?

A Yes, I remember he did call me in the afternoon. I had been in the office at the time specified and he wasn't there. The supervisor told me he was on another assignment, but he would contact me later to explain why he did not meet me, not realizing I was going to be there that day.

Q I see, and in the course of that telephone conversation did you advise him you had attempted to get the papers from Mr. Fisher and whenever you raised that question with him he avoided the question?

THE COURT: I don't understand that question and I am sure the witness does not. Would you rephrase it.

BY MR. SCULLY:

Q During the course of your telephone conversation with Special Agent Feldman did you advise him that you had contacted Mr. Fisher and requested that he return the work papers to you and [50] that when you brought the subject up to Mr. Fisher he would not give you a direct answer or avoided the question?

A I do not remember that. I remember telling him I did not have the records, but I don't remember what other conversation occurred at that time.

Q I see. Do you keep a record of the date that you turn over papers that are retained in your office to the specific client?

A Not as a rule. Records are returned periodically to all clients, and if we had to keep track of each one, it makes it awkward because I may or may not be there at the time they pick up the records.

Q When you returned the work papers in question here

to Mr. Goldsmith in the first part of August, I believe you said, did this cover only 1969 and 1970 or were there other years involved?

A There were other years involved. I gave him any papers I had up to that point.

Q Do you recall how far back they went?

A They may have gone back to 1959.

Q So that would be approximately eleven years of work papers were in your possession?

A Whatever was in that work folder.

Q And those were not returned to Mr. Goldsmith until August of 1971?

[51]

A The 4th or 5th of August, I would think, is an estimate at this point.

MR. SCULLY: Thank you, sir. I have no more questions.

CROSS EXAMINATION

BY MR. FISHER:

Q Mr. Berson, you testified that you have known Mr. and Mrs. Goldsmith for approximately twenty-five or thirty years, is that correct?

A That's right.

Q How long have you performed accounting services for them?

A At least twenty-five years.

Q Now, if we can, let's limit ourselves. When I refer to accounting papers here, let's limit ourselves to the cash receipts and cash disbursements records that are the items referred to in the summons. Have you seen the summons which was issued? I will show you exhibit number G-2. Would you look at items one and three please?

A Yes.

Q And they refer to cash receipts and cash disbursements

records of Morris Goldsmith and Sally Goldsmith, is that correct?

A Right.

Q Now, in the accounting profession, Mr. Berson, who normally [52] physically makes the entries in the cash receipts and cash disbursements records?

A Usually the client.

Q Are there some cases where rather than have the client do it the accountant does it?

A When arrangements have been made with the client for that service to be done in addition to the regular work.

Q Now, in this particular case your office under your direction did the keeping of the cash receipts and the cash disbursements records, is that correct?

A Yes.

Q And with respect to those records only, Mr. Berson, did you have any understanding over the years who those records belonged to, whether they belonged to you or whether they belonged to the Goldsmith's?

A They would belong to the client.

Q And that was always your understanding for twenty-five or thirty years?

A A detail of cash receipts, cash disbursements and general ledgers belonged to the client.

Q And it was your custom, would you explain to the Court what, in terms of time, how often you returned those papers to the client and here, specifically, to Mr. and Mrs. Goldsmith?

[53]

A Of course, the cancelled checks and the bills would have been returned immediately at the end of the year. The cash receipts and disbursements as a rule are also returned immediately, but the ledgers were held for a period of four or five years until we had the city audits. City audits usually cover five or six year periods and to make it more convenient to represent the client we usually accumulate them until we have an audit,

at the end of which time we would return the ledgers to the client.

Q Would it be your testimony then in this particular case that every five or six years after you had your city audit you returned the records to the client?

A That's right.

Q So when the Government on direct examination indicated that you were returning perhaps eleven years worth of records in August of 1971 was that a correct statement or would it be an incorrect statement?

A That is not correct because eleven years of records would be in my folder would be partially their records and partially mine.

Q But the items referred to in the summons that I just had you examine—

A Were only for the last two or three years.

Q And all the years prior to that you would have previously delivered to Mr. and Mrs. Goldsmith?

A They would have been delivered before.

[54] MR. FISHER: Try and wait until I finish the question because the reporter cannot get it if we both talk at the same time.

THE COURT: Wait until he finishes a question before you answer it.

BY MR. FISHER:

Q Would you say, Mr. Berson, that the preparation of the tax return on one hand and the preparation of the cash receipts and cash disbursements records on the other are two separate functions?

A Yes.

Q Now, assuming that Mr. Goldsmith had not come to you on or about August 3rd, 4th, or 5th, 1971 and requested those records from you at that time, would you have in the normal course of events given it to him anyhow?

A Yes, I would.

Q And so, therefore, with respect to those records described in the summons under items one and two you regarded those as your client's papers rather than your own?

A Yes.

Q And any time the client had requested the delivery of them you would have delivered them to him?

A That's correct.

Q And when you delivered them to him, as far as you are concerned, [55] he always had ownership rights and after you had delivered them he continued to have ownership rights?

A Yes.

Q And when you retained them for the short period you did, that was always for a matter of convenience so you would have them in case of a tax examination?

A That's right.

MR. FISHER: No further questions.

REDIRECT EXAMINATION

BY MR. SCULLY:

Q Mr. Berson, when Special Agent Feldman visited you on October 22, 1971 what work papers did you have in your possession at that time?

A None.

Q You had no work papers in your possession?

A No.

Q Now, when Special Agent Feldman called at your office was he not also accompanied by Special Agent John Bell?

A That's right.

Q And did you not at that time tell both Special Agent Feldman and Special Agent Bell that you had work papers relating to the cash return prepared for Morris and Sally Goldsmith for the years 1969 and 1970 in your possession?

[56]

A No, not that I can recall.

Q And did you not also tell them that those records and work papers were your property?

A I don't remember mentioning that in any definite status as to who they belonged to.

Q You don't remember that?

A No, I don't.

Q Is your testimony here today that you did not, as I understand your testimony here today, then you are stating you did not have any work papers in your possession at that time?

A At the time when the agents came in the first time?

Q Yes.

A There was no records in the office at that time, either mine or the clients that I was holding for them.

Q And prior to that time what work papers of yours did you have in your possession prior to the time the records were turned over to Mr. Goldsmith?

MR. FISHER: If your Honor please, I would like to object at this time. The only issue in this case is the enforcement of a summons calling for the cash receipts and cash disbursements records, and no other records, and I would think we ought to limit ourselves to the records which are the subject of the summons.

THE COURT: You have heard the limitation request [57] made by Mr. Fisher?

MR. SCULLY: Yes, your Honor.

THE COURT: Do you have anything to say about it?

MR. SCULLY: Your Honor, I believe that Mr. Berson's characterization of these particular documents as work papers or not work papers and as his property or the taxpayer's property is not conclusive and not binding on the Court.

MR. FISHER: I agree it is not necessarily conclusive,

although it is the Government's witness who is now testifying, your Honor, and all I am suggesting is that we limit ourselves to the subject matter of the summons.

Now, I think you might want to ascertain what he means by cash receipts and cash disbursements, but I don't like the use of terms that are not mentioned in the summons because I don't know what the Government is talking about.

THE COURT: I think that is a proper criticism. Will you limit yourself, please?

MR. SCULLY: Yes, sir.

BY MR. SCULLY:

Q Mr. Berson, what was the purpose of preparing the cash receipts and disbursements records on 1969 and 1970?

A Basically they wanted to determine what their profit was for the year and from those records we would get the totals that we [58] need to prepare returns for them, Federal and City.

Q Prepare their tax returns?

A That's right.

Q Now, in the preparation of these tax returns did you or your firm prepare any work papers other than these analyses of disbursements and receipts?

A In the case of Sally Goldsmith we have a complete set of records and after the end of the year we would have our trial balances and journal entries and follow through to the year end P and L which would be considered accountant's records.

As far as Morris's return was concerned, all we did was take figures from his deposits for the year and his checks issued for the year. He did not have a complete set of books as Sally did. His type of operation didn't warrant that type of record-keeping. We would take a summary of his receipts and disbursements and obtain figures from that and use those in arriving at the income and expense he had for the year.

Harold Berson—Redirect

Q Was there any purpose for this other than preparing his tax returns?

A Well, we had discussed the profit he would show. It is interesting to know whether or not it paid to stay in business.

Q Now, if we can clarify a statement you made a little earlier with respect to what records were in your possession dating back to 1959, would you tell me what records you were referring to at [59] that point?

A In our work folders we keep certain detail that we accumulate over the years for information that we would need at the end of the year. There may be bank reconciliations going back to 1959. Only one sheet was needed for that because it was done only once a year. We would have maybe copies of who the employees were at any one particular time. There is an accumulation of papers that you have in a folder. It doesn't warrant making a new folder each year. There is not that much detail. It depends on who the client is. From 1959 on there may have been payments made on loans that we had kept separate records of. So that it gets pretty bulky after a while and, when he needed these records, we gave the entire folder to him, not picking out anything individually.

Q Now, as a result of your analysis of the receipts and disbursements that you prepared for 1969 and 1970, did you prepare a report and submit it to Mr. Goldsmith or Mrs. Goldsmith?

A There was no written report given to them. We just used those figures in arriving, after discussing with them the profit that it showed and analyzing with then certain items that may not have made sense at the time that we had accumulated it. We prepared his tax return. All he would get is his tax return that would show what he did for the year and, of course, he got his cancelled checks back.

Q And when were the cancelled checks returned to him?

Harold Berson—Redirect

[60]

A When he got up to the office to get them. Sometimes a couple of years would accumulate before we would be able to get it back to him.

Q On every occasion are the papers that are retained in your file returned to the taxpayer or are they sometimes destroyed rather than returned?

A Sometimes they are destroyed when certain clients don't want to accumulate the records themselves. After a five or seven year period then we would destroy any records we had before then.

Q I will ask you one more time to just get this clear in my mind whether the tax returns that you prepared for 1969 and 1970 were based on the analysis of receipts and disbursements that you also prepared for those years?

A Yes.

Q And nothing else?

A I don't understand your question.

Q Did you prepare anything else other than the analysis of receipts and disbursements to enable you to complete the tax returns?

A We prepared records from the sources of information in order to accumulate information needed for the return. Now what other information would you require for the return if it wouldn't be from that information?

Q That is what I am asking you. If there was anything more than [61] the analysis of the receipts and disbursements?

A In Sally Goldsmith's records we have a complete ledger. The posting is done through a general ledger. It is more than just an analysis. An analysis of receipts and disbursements is just a writing up of the receipts and disbursements, of what occurred during the year. You would have to total them in order to get figures to put on the return.

Q I see. Is this ledger drawn up through the use of the analysis that you prepared?

A The ledger is posted monthly. If a place of business has a regular bookkeeper there they would do the same thing. Day to day they would write in the receipts and post a general ledger. In our case we had somebody that we would hire to write the records up and post for the year for Sally Goldsmith. For her we had a complete set of books. Morris, being the type of operation he has, we just took the summary at the end of the year.

Q And in connection with Sally Goldsmith was there any report of any kind given to her at the end of each year?

A There may have been statements given to her at the end of the year if she had to go to a bank or somewhere else for credit.

MR. SCULLY: I have no more questions, your Honor.

THE COURT: Recross.

RECROSS EXAMINATION

[62] BY MR. FISHER:

Q Just about two minutes, Mr. Berson. In the accounting profession does the term work papers have a meaning separate and distinct from the terminology cash receipts and cash disbursements records?

A Definitely.

Q And the records you returned to the taxpayers, the records you returned periodically to the taxpayer were of which class?

A Cash receipts and disbursements.

Q When you use the date 1959, do you know as a fact the records went back as far as 1959 or are you speculating?

A I am speculating because I think I noticed some papers in there one time that went back to 1959.

Q As a matter of fact, Mr. Berson, don't tax returns contain information other than the income and expenses of the business?

A Yes, they do.

Q For example, in tax returns you report dividends you receive, interest which you receive?

A That's right.

Q And capital gains which you may receive?

A Right.

Q And don't you deduct a number of different kinds of deductions, [63] interest, contributions, medical expenses, a lot of things other than business expenses?

A That's right.

Q So that in order to prepare a tax return you need things other than the profit and loss figures?

A That's right.

Q As a matter of fact, can't you prepare a tax return just based upon a profit and loss statement that a client might bring you which he himself prepared from his own books?

A Possible.

Q And you can base your tax return just on those totals rather than all of the detail, is that correct?

A It's possible.

Q As a matter of fact, don't you know, Mr. Berson, that Morris and Sally Goldsmith used the figure which came from the cash receipts and cash disbursements records in order to make bank loans?

A Yes, they did.

Q And that they were used for the purpose of determining whether their business was being operated on a profitable basis and what the mark-up was?

A That's correct.

Q And these are the normal purposes that businesses use their [64] financial records for in addition to preparing their tax returns?

A That's correct.

MR. FISHER: No further questions.

THE COURT: Mr. Scully?

MR. SCULLY: Nothing more, your Honor.

THE COURT: Thank you very much, Mr. Berson.
(Witness leaves stand.)

THE COURT: Your next witness.

MR. SCULLY: The Government has nothing more, your Honor.

THE COURT: The Government has rested, Mr. Fisher. Your witness please.

MR. FISHER: Yes, sir. If the Government prefers, I can do this through the witnesses, but they will corroborate the turning over of the records, the history by Mr. Berson, and they will also claim the Fifth Amendment. That is the only purpose for which I intend to put Mr. and Mrs. Goldsmith on the stand and, if the Government would stipulate they would so do it, I think that would terminate the case, sir.

THE COURT: Mr. Scully?

MR. SCULLY: I don't want to prolong this proceeding past four o'clock, but I have no way of knowing what the Goldsmiths will testify to.

THE COURT: Well, if you can't stipulate on the [65] statements that Mr. Fisher has made, then you would want to hear the witnesses.

MR. SCULLY: That's correct, your Honor.

MR. FISHER: I call Morris Goldsmith.

MORRIS GOLDSMITH, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Goldsmith, you have heard Mr. Berson testify today?
A Yes.

Q When he recited to you that history of—strike that. When he recited the history of turning over the records, do you know of your own knowledge whether his recitation was true and correct?
A Yes.
Q Was it true and correct, sir?
A It was true.
Q With respect to the cash receipts and cash disbursements records for your business did you regard them as your property or Mr. Berson's property?
A I would regard them as my property.
Q Did you have an understanding or agreement with Mr. Berson that they were your property?

[66]

A I say yes because for the last thirty years that he has been keeping my books they have been returned to me.
Q And any time you asked for them you were given them?
A Many times Mr. Berson would ask me to come and please take them because he didn't have room.
Q All right. And those records which you delivered to me, Mr. Goldsmith, did you deliver them to me in connection with obtaining legal advice?
A Yes.
Q With respect to those records to the extent that you have a privilege under the Fifth Amendment and a privilege of confidential communication with your attorney, do you claim that privilege, sir?
A Yes.

MR. FISHER: No further questions.

CROSS EXAMINATION

BY MR. SCULLY:

Q Mr. Goldsmith, would you tell me what the substance of that agreement between yourself and Mr. Berson is with respect to the cash receipts and disbursements analysis?

A I submit them to Mr. Berson and from that he determines my tax. I have been doing this for the last twenty-five, thirty years.

Q I see. And do you have a written agreement with Mr. Berson with respect to whose property these records will be after they [67] prepared.

A No, sir.

Q Have you ever discussed it with him other than just the fact that it has always been that way?

A It has always been that way. As I say, many times he has called me and asked me to please take my records back.

Q I see. But he didn't call you and ask you to take these records back during the first part of August, 1971, did he?

A No.

Q You called him, did you not?

A Yes.

Q And asked for the records?

A Yes.

Q And why did you ask him for the records?

A On advice of my counsel.

Q And this was after you had been contacted by Special Agent Feldman, had you not?

A I actually was never contacted. I never met Mr. Feldman. I spoke to someone on the phone who said they wanted to meet me or—I never met Mr. Feldman.

Q Let the record show I am not attempting to ask him whether he ever met Mr. Feldman. I am asking whether you were contacted by Special Agent Feldman by telephone?

A No, I was not contacted.

[68]

Q You did not arrange to meet with Special Agent Feldman on August 3, 1971?

A I did not. I called Mr. Feldman and he asked me either to meet with him or for my records and I referred him to Mr. Fisher.

Q But you do recall speaking with Mr. Feldman?

A I do vaguely. I am not sure. I will be very honest with you. I am not sure. My wife told me that they had been to the store and a number was left and I called that number and that was the first time that I knew what was going on.

Q And what was your impression of what was going on?

MR. FISHER: I will object to that, your Honor.

THE COURT: Objection sustained.

MR. SCULLY: I have nothing more, your Honor.

THE COURT: Thank you. Any redirect, Mr. Fisher?

MR. FISHER: Just one question.

REDIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Goldsmith, did you use your financial information that Mr. Berson prepared for purposes other than for the preparation of your tax return?

A No.

Q Did you ever make any bank loans?

A Oh, yes, when it was necessary if I needed a profit and loss [69] statement I would take that into the bank. Yes, I misunderstood you.

MR. FISHER: Thank you.

THE COURT: What business are you in, Mr. Goldsmith?

MR. GOLDSMITH: I am in the textile waste business, sir.

THE COURT: Textile waste?

MR. GOLDSMITH: Yes, that is the by products of the manufacturers that cut materials, cloth.

THE COURT: Thank you.

MR. FISHER: That's all, Mr. Goldsmith.
(Witness leaves stand.)

MR. FISHER: Mrs. Goldsmith.

SALLY GOLDSMITH, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mrs. Goldsmith, were you in court when Mr. Berson testified?
A Yes.
Q And you heard Mr. Berson recite the history of periodically returning to you your cash receipts and cash disbursements records?
A Yes, I did.
Q Is that true and correct?
A It is very true.

[70]

Q Did you use the information obtained from those cash receipts and cash disbursements for purposes other than the preparation of your tax return?
A Yes, to make loans.
Q Did you also use it in determining the mark-up in your business and your profitability and so on?
A Yes, I did.
Q Did you have those records delivered to me with respect specifically to the years 1969 and 1970 in order to obtain legal advice from me?
A Yes, we did.
Q With respect to those records which you turned over to me to the extent you have a right to claim a privilege under the Fifth Amendment and confidential communications between attorney and client, do you claim them?

A Yes, I do.

MR. FISHER: May we have one moment, your Honor?
(Defense counsel confer.)

MR. FISHER: You may cross examine.

THE COURT: What business are you in, Mrs. Goldsmith?

MRS. GOLDSMITH: I have a women's wear shop.

THE COURT: Where?

MRS. GOLDSMITH: 915 Snyder Avenue.

MR. SCULLY: No questions, your Honor.

[71] THE COURT: Thank you very much.

MR. FISHER: You may step down, Mrs. Goldsmith.
(Witness leaves stand.)

MR. FISHER: We have no further witnesses, your Honor.

MR. SCULLY: We have nothing more, your Honor.

THE COURT: I will expect a brief from both sides in this case before I decide it and suppose we say a brief in a week?

MR. FISHER: Can we wait until the transcript is available, your Honor? I think we have a factual question to be determined and I think references to this record would be very helpful.

MR. SCULLY: I would also like the transcript.

THE COURT: All right. The brief will be presented to this Court within one week after the transcript of testimony and are you two ordering the transcript of the testimony?

MR. FISHER: We will, your Honor.

Adjournment

MR. SCULLY: Yes, your Honor.

THE COURT: All right. I don't know which one of you gentlemen would be required to file your brief first. Do you mind letting me know what your choice is in the matter?

[72] MR. FISHER: I can see no reason why we can't file simultaneous briefs within ten days after the record is available.

THE COURT: Suppose we make it two weeks from the date of receiving the transcript. I will expect it then and I certainly need the law briefed on this particular case. So I will expect to hear from you.

NOW, 4:10 P.M., Court adjourns.

Reported by:
Elizabeth P. Mensch

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Summons

Department of the Treasury
Internal Revenue Service

INTELLIGENCE DIVISION
P. O. BOX 12914
PHILA. PA. 19108
PHONE #597-2255

In the matter of the tax liability of

MORRIS GOLDSMITH
Internal Revenue District of Philadelphia
Period(s) 1968, 1969, 1970

THE COMMISSIONER OF INTERNAL REVENUE

To Harold Berson, C.P.A.
Suite 106 Rydal West
At Jenkintown, Pa.

Greetings: You are hereby summoned and required to appear before Alan M. Feldman an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Address: 4641 Pine Street, Phila. Pa.

1. All workpapers, permanent files, account analysis, and correspondence.
2. All tax returns, and backup information used to prepare said returns.
3. All of the following information in your possession:
   a. Cash Receipts book
   b. Cash Disbursements
   c. Check Disbursements
   d. General Journals
   e. Subsidiary Ledgers
   f. Accounts Receivable Ledgers
   g. Accounts Payable Ledgers
   h. Bank Statements
   i. Canceled Checks
   j. Bank Deposit Slips
4. Copies of payroll tax returns for the above years.

PLACE AND TIME FOR APPEARANCE: at Room 752, 401 North Broad Street, Philadelphia, Pennsylvania, 19108 on the 3rd day of November, 1971 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or a disobedience.

Issued under authority of the Internal Revenue Code
this 22nd day of October, 1971.

Original

Alan M. Feldman /s — Signature

SPECIAL AGENT — Title

(Certificate of Service of Summons Omitted in Printing.)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners

Misc. No. 72-18

v.

SOLOMON FISHER,
Respondent.

Filed: Mar. 1, 1972

ORDER

AND NOW, this 8th day of March, 1972, upon consideration of the Amended Petition To Intervene of Morris Goldsmith and Sally Goldsmith and of the memoranda and argument submitted thereon it is hereby ORDERED that the Amended Petition To Intervene is granted and the said Morris Goldsmith and Sally Goldsmith are hereby made parties to this proceeding.

John Morgan Davis, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

PROPOSED FINDINGS OF FACT OF RESPONDENTS

1. Over the course of approximately twenty-five years in which accountant Berson performed services for the Goldsmiths, analyses of cash receipts and disbursements were regularly given to the Goldsmiths for their permanent possession within several years of their preparation.

2. Accountant Berson does not desire or expect the return to him of the records sought by the government.

3. The possession by the Goldsmiths or their attorney of the records sought by the government is and at all times was consented to by accountant Berson.

4. Cash receipts and cash disbursements records are usually kept by the accountant's client.

5. Cash receipts and cash disbursements records are important for businesses to have for such purposes as determining profit, setting prices, and obtaining financing.

6. An understanding existed between accountant Berson and the Goldsmiths that analyses of cash receipts and cash disbursements belonged to the Goldsmiths.

7. Analyses of cash receipts and cash disbursements are not accountant's work papers.

8. The Goldsmiths gave the records sought by the government to their attorney, respondent Fisher, for legal advice, and the records have been used for that purpose.

9. Special Agent Feldman is part of the Intelligence Division of the Internal Revenue Service, and is not part of any other division, including the Audit or Collection Division.

10. There is no representative from any other division assigned to the Goldsmith investigation.

/s/ Solomon Fisher
SOLOMON FISHER
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109

Attorneys for Respondents

Of Counsel:

DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN

Dated: June 2, 1972

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service

v.

SOLOMON FISHER

Misc. No. 72-18

ORDER

DAVIS, J.

AND NOW, this 31st day of August, 1972, it is hereby ORDERED that the time for Respondent to comply with the Court's Order of August 4, 1972, is extended to October 4, 1972.

BY THE COURT.

JOHN MORGAN DAVIS, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners,

v.

SOLOMON FISHER,
Respondent,

and

MORRIS GOLDSMITH and
SALLY GOLDSMITH,
Intervenors.

Misc. No. 72-18

ORDER

AND NOW, this 29th day of September, 1972 it is hereby ORDERED that the Order of August 4, 1972 is stayed pending final determination by the United States Court of Appeals of the appeal from the said Order.

JOHN MORGAN DAVIS, J.